IN THE

Supreme Court of the United States

OCTOBER TERM, 1978

No. 78-602

TUSCAN DAIRY FARMS, INC.,
Petitioner-Appellant,

against

J. ROGER BARBER, As Commissioner of Agriculture and Markets of the State of New York,
Respondent-Appellee.

ON APPEAL FROM THE NEW YORK STATE COURT OF APPEALS

JURISDICTIONAL STATEMENT

MICHAEL LESCH
Shea Gould Climenko & Casey
330 Madison Avenue
New York, New York 10017
(212) 661-3200
Attorneys for Tuscan Dairy Farms, Inc., Appellant

Of Counsel
MILTON S. GOULD
MICHAEL LESCH
SANFORD A. BELL
DALE C. CHRISTENSEN, JR.

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Opinions Below

The opinion, reported at 45 N.Y.2d 215 (1978), and remittitur of the New York Court of Appeals affirming the judgment of the Appellate Division are set forth in Appendix A hereto.

The opinion of the New York Appellate Division, reported at 58 App. Div. 2d 491, 397 N.Y.S.2d 446 (3d Dept. 1977), and order entered thereon, confirming the determination of the Commissioner, which denied appellant's application for an extension of its milk dealer's license, and dismissing the petition seeking annulment of the denial are set forth in Appendix B hereto. The Commissioner's Memorandum, Findings of Fact, Conclusion and Determination are set forth at Appendix C hereto.

Statement of the Grounds on which the Jurisdiction of this Court is Invoked

In a civil proceeding brought pursuant to Article 78 of the New York Civil Practice Law and Rules, appellant challenged the determination of the Commissioner denying appellant's application for an extension of its milk dealer's license in New York, pursuant to Section 258-c (2) and (3) of the New York Agriculture and Markets Law, to permit it to sell at wholesale in Richmond County, New York, milk transported from New Jersey. The Commissioner's determination was based on the ground that granting the requested license extension "would tend to a destructive competition for milk sales in a market already adequately served and as such would not be in the public interest" (38a).[1]

1. Numbers in parentheses followed by "a" refer to pages of appendices; numbers preceded by "A" refer to pages of the record on appeal in the Court of Appeals.

Appellant asserted, in its pleadings and at all stages of the appeal that Section 258-c (2) and (3) of the New York Agriculture and Markets Law, as applied by the Commissioner, is repugnant to the Commerce Clause of the United States Constitution (U.S. Const., Art. 1, sec. 8, cl. 3). The decision of the Court of Appeals upheld the constitutionality of Section 258-c (2) and (3) of the Agriculture and Markets Law, as applied by the Commissioner, and expressly rejected appellant's contentions based on the Commerce Clause (45 N.Y.2d at 222-230; 7a-18a).

The final judgment sought to be reviewed is the decision and judgment made and entered on July 11, 1978 by the New York State Court of Appeals (Appendix A) which affirmed the order of the New York Appellate Division, Third Department which in turn confirmed the determination of the Commissioner. On October 6, 1978 the Notice of Appeal was filed with the New York State Supreme Court, Albany County, the court possessed of the record. A copy thereof, with proof of service, is set forth in Appendix D hereto.

Jurisdiction of the Supreme Court to review the decision and judgment herein is conferred by 28 U.S.C. § 1257(2).

Statute Involved

Section 258-c of New York Agriculture and Markets Law, the statute involved, provides that the Commissioner may refuse permission to sell milk in New York based on a finding that such sale will "tend to a destructive competition in a market already adequately served." The statute reads as follows:

258-c. *Granting and revoking licenses*

> "No license shall be denied to a person not now engaged in business as a milk dealer, or for the continuation of a now existing business, and no license

shall be denied to authorize the extension of an existing business by the operation of an additional plant or other new additional facility, unless the commissioner finds by a preponderance of the evidence, after due notice and opportunity of hearing to the applicant or licensee, one or more of the following: (1) that the applicant is not qualified by character or experience or financial responsibility or equipment properly to conduct the proposed business, provided however, that no new application shall be denied solely for the reason of inadequate equipment if it is shown that provision has been made for the acquisition of same; (2) that the issuance of the license will tend to a destructive competition in a market already adequately served; or (3) that the issuance of the license is not in the public interest."

Questions Presented

1. Whether the Commissioner's determination pursuant to Section 258-c of the New York Agriculture and Markets Law, absolutely excluding the sale of milk in interstate commerce at wholesale in Richmond County, New York, by appellant (otherwise found to be wholly qualified to sell milk in New York) solely on the ground that such exclusion protects local competition, is prohibited by the Commerce Clause of the United States Constitution?

2. Whether the absolute exclusion by New York State of appellant's interstate sales of milk in Richmond County may be justified on the ground that the State did not have "as its avowed purpose the exclusion of competition from out of State for the protection of the economic well-being of the milk industry within the State" (45 N.Y.2d at 225; 11a)?

Statement of the Case

Appellant, a New Jersey milk dealer, upon receiving a request from Pathmark Supermarkets ("Pathmark"), a supermarket chain which it serves in New Jersey, to supply Pathmark stores in Richmond County, New York (Findings ¶5, 31a-32a), filed an application in May, 1975 with the New York Department of Agriculture and Markets for a license extension permitting deliveries at wholesale, in that county, of milk processed in New Jersey. (Findings ¶2, 31a). A hearing was held July 15, 1975.

Although he denied appellant's application, the Commissioner specifically found that such denial was not based on any ground such as health (Findings ¶¶2, 3; 31a), safety (*Id.*), equipment (Findings ¶2, 31a), or financial responsibility (Findings ¶14, 34a). He stated:

> "On the basis of the record, it can not be concluded that applicant's request for extension of its milk dealer's license to Richmond County should be denied for reason of character or experience or financial responsibility or equipment properly to conduct the proposed business" (Conclusions, 38a).

The sole ground recited in the Commissioner's determination for denying appellant's application was that under §§258-c (2) and (3), permission to sell in interstate commerce "would tend to a destructive competition for milk sales in a market already adequately served and *as such* would not be in the public interest" (38a, emphasis added).

Appellant thereupon instituted a proceeding seeking review of the Commissioner's determination. Pursuant to CPLR § 7804(g) the proceeding was transferred on consent from the New York Supreme Court, Albany County, to the Third Department of the Appellate Division of the New York Supreme Court. Appellant's verified petition therein raised the constitutional question this Court is asked to review as follows (par. 12):

> "By reason of the foregoing, section 258-c (2) of the Agriculture and Markets Law of the State of New York, as construed and applied by respondent, effects an unreasonable burden upon interstate commerce in violation of Article 1, Section 8, Clause 3 of the United States Constitution . . . ." (A15).

The Commerce Clause issues were also raised in appellant's briefs to the Appellate Division and its Statement pursuant to CPLR 5531.

On August 18, 1977, the Appellate Division confirmed the determination of the Commissioner and dismissed appellant's petition finding that the Commissioner's application of § 258-c did not violate the Commerce Clause (58 App. Div. 2d 491; 24a-28a).

Appellant appealed to the Court of Appeals from the Appellate Division's order, again specifically raising the constitutional questions sought to be reviewed here in its Statement Pursuant to Rule 5531 of the New York Civil Practice Law and Rules (A2) and Notice of Assertion of Unconstitutionality (A310) filed with the Court of Appeals, in its briefs and arguments presented to the Court of Appeals, and in its pleadings which were part of the record before the Court of Appeals (A11-A16).

The Court of Appeals decided against appellant on the ultimate issue presented on this appeal by affirming the judgment of the Appellate Division and stating that the "denial by the Commissioner of Agriculture and Markets of a license to extend delivery of milk on a wholesale basis into the County of Richmond to a New Jersey dealer already licensed to supply and supplying milk in other counties of the State did not violate the Commerce Clause of the United States Constitution" (45 N.Y.2d at 218; 1a).

The Court of Appeals recognized that this Court's decision in *Baldwin* v. *G.A.F. Seelig*, 294 U.S. 511 (1935) constitutes "unquestioned authority . . . for the proposition that legislation enacted solely for the protection of local economic interests by the restriction of competition from without the State is inherently unconstitutional" (45 N.Y. 2d at 224; 9a) and candidly admitted that it knew of no decision of this Court upholding the validity under the Commerce Clause of exclusionary action such as that taken by the Commissioner here (*Id.* at 222; 7a).

Nevertheless, the Court of Appeals, disregarding the clear language of the Commissioner's determination (38a), concluded that the "cardinal and distinguishing significance" of this case "is the fact that the Commissioner's denial of the license sought by [appellant] did not have as its objective the economic protection of the milk industry of New York State, or even that of the County of Richmond" (45 N.Y.2d at 225; 11a). The apparent basis for this conclusion was the Court's reading of the Commissioner's determination as one "addressed . . . to the maintenance of the existing 'balanced milk distribution structure'" (*Id.* at 225; 11a-12a), which, while admittedly "provid[ing] a measure of economic protection to businesses already operating within the existing system" was nevertheless thought to be "in the public interest" (*Id.* at 226; 12a).

The Court further concluded that Section 258-c, as applied by the Commissioner, was valid under the Commerce Clause because it did not have as its "avowed purpose" the "exclusion of or discrimination against competition originating without the State" (*Id.* at 226; 13a) and had "no aspiration to affect or regulate the milk industry outside the boundaries of New York" (*Id.* at 227; 14a).

Facts of the Case

At the hearing on appellant's application, eight of the nine witnesses presented by the Department of Agriculture and Markets represented milk dealers then operating in Richmond County. Obviously, their testimony was colored by the desire to prevent competition from a highly successful newcomer. The remaining witness presented the identical statistics about the Richmond County milk market that had been offered at the prior hearing as to Elmhurst Milk and Cream Co., Inc., a New York distributor whose application to distribute within Richmond County had been granted only four months prior to the hearing (A40-A43).

These statistics showed that, as of February, 1975, 17 dealers were licensed to distribute milk at wholesale in Richmond County. Of these, 16 were New York dealers (A263). The record also revealed that ten New York dealers had been granted permission to sell within Richmond County in the year prior to the hearing (A263) and that these included six licensed to sell at wholesale (*Id.*). While there was testimony in the record that the entry of new dealers in the past had been accompanied by a period of intensified price competition (A118), there was also testimony that these periods were followed by a levelling-off stage when "the new distributor finds his place in the market" (A123) and that such periods of intensified competition would periodically occur whether or not a new competitor entered the market (A122-A123). Significantly, there was no evidence that any milk dealer had been driven out of business (or was in danger of being driven out of business) during any such periods of intensified price competition.

The evidence demonstrated the interest of all processors and distributors in handling accounts of every size. Weissglass, the distributor with the largest sales in the County (A261) testified that it served customers of every size,

from supermarket chains to vegetable stands and home delivery (A115). Elmhurst, the largest processor dealing in Richmond County according to the record (A153) served "fruit stores, meat stores, dairy stores, deli's and small stores" (A134). Queens Farms, another large-scale enterprise, characterized its sales to "stores, deli's, nursing homes, dairy stores, and 7-11's" as "peanuts", but testified that "all the peanuts make up a big volume" (A151). The testimony of the other Richmond County dealers was consistent on this point. And the testimony of Tuscan on the range of customers it served where it currently is licensed was no different (A217).

In sum, the only evidence in the record was that large-scale distributors, including Tuscan, served customers of all sizes and that Tuscan's interest in supermarket accounts in the County derived from a specific request by a chain served by Tuscan (A202).

There was no evidence that any Richmond County dealers were operating at a deficit or were in danger of going out of business. There was no attempt to determine whether, should one or more dealers cease activity in Richmond, there would be a lack of interest of other dealers in serving any abandoned accounts. There was no attempt to project the amount and type of business which might be adversely affected by Tuscan's entry. Similarly, there was no attempt to determine whether the increased population in Richmond County[2] would not offset, in the long run, any temporary losses of business to Tuscan. No expert witness was produced to analyze the intensity of competition in Richmond County or the impact of a new entry into the market.

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2. The Commissioner has noted that the County population increased by 33% in the 1960's (Findings ¶8, 32a-33a) and was anticipated to have increased an additional 8% by 1975. (A40).

THE QUESTIONS PRESENTED ON THIS APPEAL ARE SUBSTANTIAL

1. The Absolute Exclusion Of The Sale Of Milk In Interstate Commerce At Wholesale By Appellant (Otherwise Found Wholly Qualified To Sell In New York) On The Ground That Such Exclusion Protects Local Competition Is Prohibited By The Commerce Clause.

This Court has consistently held that a state has no power to prohibit the sale of goods in interstate commerce solely for the protection of local economic interests, *Baldwin* v. *G.A.F. Seelig*, 294 U.S. 511 (1935); *H. P. Hood & Sons, Inc.* v. *DuMond*, 336 U.S. 525 (1949).[3] This principle was unavoidably recognized in the majority opinion of the Court below which stated (45 N.Y.2d at 224; 9a):

> "There is unquestioned authority, on which [appellant] relies, for the proposition that legislation enacted solely for the protection of local economic interests by the restriction of competition from without the State is inherently unconstitutional".

Ignoring its own analysis of the controlling decisions of this Court, however, the Court of Appeals held that the Commissioner's absolute prohibition of appellant's interstate sales of milk in Richmond County, New York could be justified as a measure on the sole ground of preserving the existing local competitive and distribution structure. In so holding the Court below clearly erred.

Thus, in *Baldwin*, this Court (by Cardozo, J.) held that a New York regulation prohibiting the sale of milk from outside New York unless the price paid to the non-New Yorker was one that would be lawful upon a like transaction within New York violated the Commerce Clause.

3. Appellee conceded in its brief to the Court of Appeals that a sale at wholesale from appellant to a New York supermarket is "an exclusively interstate transaction" (p. 8).

The Court observed that New York conceded it "has no power to project its [price control] legislation" on transactions in Vermont and continued (294 U.S. at 521):

> "New York is equally without power to prohibit the introduction within her territory of milk of wholesome quality acquired in Vermont, whether at high prices or at low ones. This again is not disputed."

In *Hood*, this Court held that Section 258-c(2)—the very same provision at issue in this case—could not be applied to foreclose transactions in interstate commerce. And in *Hood*, the Commissioner made the very same concession made in *Baldwin*. As the Court stated (336 U.S. at 531):

> "The State agreed then [in *Baldwin*], as now [in *Hood*], that the Commerce Clause prohibits it from directly curtailing movement of milk into or out of the State."

Indeed, even the Court of Appeals recognized at one point in its opinion that an absolute prohibition of the movement of milk in New York is prohibited, although regulation is permitted. The Court of Appeals stated (45 N.Y.2d at 222-223; 7a-8a):

> "We find no decision [of the Supreme Court] which is squarely dispositive. The cases which have upheld state regulation of commerce in milk and dairy products against challenges under the commerce clause have presented predominantly issues of local price *regulation* [as opposed to outright prohibition], and are thus distinguishable from the present case." (emphasis added.)

Nonetheless, the Court of Appeals refused to apply the principles of *Baldwin* and *Hood* to this case. It found of "cardinal and distinguishing significance" the fact that the Commissioner's action "did not have as its objective the

economic protection of the milk industry of New York State" (45 N.Y.2d at 225; 11a). It continued (*Id.* at 225-226; 11a-12a):

> "The commissioner's concern in this instance was addressed rather to the maintenance of the existing 'balanced milk distribution structure', and particularly the portion of the present distribution system which provides 'service on retail home delivery routes and service to small volume wholesale customers', the small outlets and mom and pop stores, which individually and collectively serve consumer needs not met by supermarkets and warehouse type outlets".

The Court of Appeals then characterized the foregoing as "necessary to serve the varied needs of milk consumers in Richmond County" (*Id.* at 226; 12a) and a "consumer protection" measure (*Id.* at 228; 16a).

The purported distinction of this case from *Baldwin* and *Hood* is insupportable for two reasons. *First,* the Commissioner's determination recites as the *sole* ground for its exclusion of appellant from Richmond County, that appellant's entry "would tend to a destructive competition for milk sales in a market already adequately served and as such would not be in the public interest" (38a). Thus the Commissioner has admitted the palpably protectionist basis for his decision, a basis which is also set forth in the words of § 258-c(2). The attempt of the Court of Appeals to transform the Commissioner's admitted economic protectionism into a consumer-oriented determination is wholly without support in the record.[4]

Second, in *Baldwin* this Court rejected virtually the identical argument used by the Court of Appeals in this case, stating (294 U.S. at 522-23):

4. Thus, there is nothing in the record as to any "consumer needs" met by "mom and pop stores" or "small outlets" which are not met by supermarkets.

> "The argument is pressed upon us, however, that the end to be served by the Milk Control Act is something more than the economic welfare of the farmers or of any other class or classes. The end to be served is the *maintenance of a regular and adequate supply* of pure and wholesome milk, the supply being put in jeopardy when the farmers of the state are unable to earn a living income. *Nebbia* v. *New York, supra.* Price security, we are told, is only a special form of sanitary security; the economic motive is secondary and subordinate, the state intervenes to make its inhabitants healthy, and not to make them rich. *On that assumption we are asked to say that intervention will be upheld as a valid exercise by the state of its internal police power, though there is an incidental obstruction to commerce between one state and another. This would be to eat up the rule under the guise of an exception.* Economic welfare is always related to health, for there can be no health if men are starving. *Let such an exception be admitted, and all that a state will have to do in times of stress and strain is to say that its farmers and merchants and workmen must be protected against competition from without, lest they go upon the poor relief lists or perish altogether.* To give entrance to that excuse would be to invite a speedy end of our national solidarity. The Constitution was framed under the dominion of a political philosophy less parochial in range. It was framed upon the theory that the peoples of the several states must sink or swim together, and that in the long run prosperity and salvation are in union and not division." (emphasis added.)

Clearly, New York State has no more valid interest in maintaining a "balanced milk distribution structure" here than it had in *Baldwin* in the "maintenance of a regular and adequate supply of pure and wholesome milk." The argument made here that the existing competitive structure is necessary to "serve consumer needs" (without ever

explaining why) is no more persuasive than that the price regulation at issue in *Baldwin* was "a special form of sanitary security." *Baldwin* is dispositive of the issues in this case. As Judge Jasen noted in his dissenting opinion below, the attempt to disguise economic goals as consumer measures (45 N.Y.2d at 231-32; 20a):

> "constitutes nothing more than a subtle variant of the bootstrap argument that regulation of competition—an impermissible local interest—will in itself contribute to health—a permissible local interest. Needless to say, the Supreme Court has consistently rejected this argument. (See, e.g., *Hood & Sons* v. *DuMond*, 336 U.S. 525, 538, *supra*; *Baldwin* v. *G.A.F. Seelig*, 294 U.S. 511, 522-23, *supra*; *Buck* v. *Kuykendall*, 267 U.S. 307, 315-316.)"

The sole basis upon which the Court of Appeals sought to distinguish *Baldwin* was its statement that "[u]nlike *Baldwin* (294 U.S. 511, *supra*) and *A&P Tea Co.* (424 U.S. 366, *supra*) there is here no aspiration to affect or regulate the milk industry outside the boundaries of New York" (45 N.Y.2d at 227; 14a).

We respectfully submit that this fact cannot distinguish *Baldwin* for several reasons. First, the Commissioner's action here had a far more egregious effect on transactions in New Jersey, than the regulation in *Baldwin* had on transactions in Vermont. Here the transaction was prohibited outright[5] whereas in *Baldwin*, New York merely sought to regulate the price of the milk sold in Vermont.

5. The Commissioner in a recent statement of policy acknowledged that dealers are precluded from delivery of milk in areas where they are unlicensed, regardless of arrangements as to passage of title. The Commissioner's licensing policy procedures state in relevant part:

> "A milk dealer may sell or distribute milk only to customers and accounts (including other milk dealers) within those markets or areas where he is duly licensed. He is precluded from arranging for f.o.b. or dock sales or other means of serving potential customers in other markets or areas regardless of the arrangements or methods which may be devised for the sale and delivery of the milk."

"Milk Dealer Licensing Policy and Procedures", Memorandum of the Department of Agriculture & Markets, at Part III, § 1(d) (March 1, 1976). A complete copy of the Department's Memorandum is set forth as Appendix E hereto.

Moreover, whether or not the delivery takes place in New Jersey or New York (depending on whether Tuscan delivers the goods to Richmond County or Pathmark sends its truck to New Jersey to receive the milk) makes no difference.

Thus, in *Schwegmann Bros. Giant S. Mkts.* v. *Louisiana Milk Comm.*, 365 F.Supp. 1144 (M.D. Louisiana 1973), *aff'd* 416 U.S. 922 (1974), the Court held that the Commerce Clause prevented the Louisiana Milk Commission, acting under the Louisiana statute, from requiring Schwegmann, a Louisiana retailer, to pay Pure Vac, a Tennessee manufacturer of frozen desserts, the minimum prices fixed by the Commission. The Court also held that the result would be the same even if the goods were carried into Louisiana by the seller, stating (365 F.Supp. at 1155):

> "Under *Baldwin* there can be no doubt that Louisiana could not regulate the price paid Pure-Vac if Schwegmann purchased the ice milk in Tennessee and it was shipped to Louisiana by common or contract carrier. And we fail to see why that result should change merely because instead of shipping the goods into Louisiana by common carrier, Pure-Vac transports them by its own trucks as long as (1) the ice milk was produced in Tennessee, (2) title passed there, and (3) Pure-Vac conducts no other business operation in Louisiana other than its delivery, as bailee, of ice milk it has sold to a Louisiana retailer. If on the other hand Pure-Vac sold its ice milk in Louisiana, that is if title passed here, as for example, if it conducted a store-to-store peddling operation, it would be doing business in Louisiana and subject to regulation here."

Here, it is clear that (1) the milk is processed in New Jersey (Findings ¶2, 31a) and that the Commissioner's Order prohibited sales to Pathmark, a New York supermarket, even if (2) title were to pass in New Jersey and (3) Tuscan were to conduct no other business operations in New York other than delivery of its milk to New York retailers. It is also clear that Tuscan is not conducting a "store-to-store peddling operation."

Since this Court affirmed *Schwegmann*, it disposed of the case on the merits and thereby indicated that the *Schwegmann* court correctly interpreted the prevailing rule. If the Commissioner in this case (as in *Schwegmann* and *Baldwin*) had merely fixed the prices of sales from Tuscan to Pathmark, that would have violated the Commerce Clause under *Schwegmann* and *Baldwin*. But here, the Commissioner went even further. He prohibited sales outright, an even clearer violation of principles which have been the constitutional law of the land for more than forty years.

2. The Absolute Exclusion By New York State Of Appellant's Interstate Sales Of Milk In Richmond County Cannot Be Justified On The Ground That The State Did Not Have "As Its Avowed Purpose The Exclusion of Competition From Out of State For The Protection of the Economic Well-Being of the Milk Industry Within The State" (45 N.Y. 2d at 225; 11a).

The Court of Appeals attempted to distinguish this case from *H. P. Hood & Sons, Inc.* v. *DuMond*, 336 U.S. 525 (1949) and *A&P Tea Co.* v. *Cottrell*, 424 U.S. 366 (1976) on the ground that Section 258-c and the Commissioner's action did not have as their "avowed purpose" the "discrimination against competition originating without the State" (45 N.Y.2d at 225, 226; 11a, 13a). It also stated (*Id.* at 227; 14a):

> "No reference is made in the statute to the source of of the competition, whether from within the State or without. That the absence of such a distinction is a significant factor in viewing applications of the statute adverse to an out-of-State dealer, see *Panhandle Co.* v. *Michigan Comm.* (341 U.S. 329, 337). Moreover, and equally significant, nothing in the record indicates that commissioner's application of the statute in this instance or in general has been other than evenhanded in treatment of interstate and intrastate commerce alike."

This Court has never recognized the absence of "avowed" discrimination as a justification for exclusionary action for economic ends. While this Court has referred to "discrimination" in a Commerce Clause context, it has made clear that no discriminatory intent is required and that the *exclusion* of interstate commerce to protect or preserve local economic interests is *per se* "discriminatory". This Court so held in *Panhandle E. P. Co.* v. *Michigan Public Service Comm.*, 341 U.S. 329, 337 (1951) (a case which the majority's opinion relies on as supporting a contrary result) when it characterized *Hood* as a case:

> ". . . where a state was said to have discriminated against interstate commerce *by prohibiting* it because it would subject local business to competition." (emphasis added.)

It is this type of "discrimination" that the Commerce Clause forbids regardless of whether the discrimination favors some local competitors (as in *Dean Milk Co.* v. *City of Madison*, 340 U.S. 349 (1951)) or all local competitors as in (*Polar Ice Cream & Creamery Co.* v. *Andrews*, 375 U.S. 361 (1964)).

Thus, in *Dean Milk Co.* v. *City of Madison, supra*, this Court held that the ordinance in question violated the Commerce Clause, notwithstanding the fact that the ordinance

did not "discriminate" against interstate commerce, holding (340 U.S. at 354, fn. 4):

> "It is immaterial that Wisconsin milk from outside the Madison area is subjected to the same proscription as that moving in interstate commerce."

In *Dean* this Court was confronted with an attempt by the City of Madison, Wisconsin to justify a milk pasteurization ordinance by claiming that it was actually a health measure for the benefit of milk consumers. This Court, reaffirmed *Baldwin* and again rejected economic protectionism in the guise of a health measure, stating (340 US. at 354):

> "A different view, that the ordinance is valid simply because it professes to be a health measure, would mean that the Commerce Clause itself imposes no limitations on State action other than those laid down by the Due Process Clause, save for the rare instance where a State artlessly discloses an avowed purpose to discriminate against interstate goods."

Accord: *Pike* v. *Bruce Church, Inc.*, 397 U.S. 137, 145 (1970); *Toomer* v. *Witsell*, 334 U.S. 385, 403-06 (1948).

The Court below also contravened this Court's recent decision in *City of Philadelphia* v. *New Jersey*, —— U.S. ——, 46 U.S.L.W. 4801 (June 23, 1978) which held that a New Jersey statute violated the Commerce Clause notwithstanding its professed concern for preservation of the environment, stating (p. 4803):

> "[W]here simple economic protectionism is effected by state legislation, a virtually per se rule of invalidity has been erected. See e.g., *Hood & Sons* v. *DuMond*, *supra*; *Toomer* v. *Witsell*, 334 U.S. 385, 403-06; *Baldwin* v. *G.A.F. Seelig*, *supra*; *Buck* v. *Kuykendall*, 267 U.S. 307, 315-316. The clearest example of such legislation is a law that overtly blocks the flow of interstate commerce at a State's borders. Cf. *Welton* v. *Missouri*, 91 U.S. 275."

The present case—where the Court of Appeals professes concern for the "existing balanced milk distribution structure"—is the "clearest example" of state legislation effecting "simple economic protectionism"—"a law that overtly blocks the flow of interstate commerce at a State's borders." Time and again this Court has rejected such efforts.

The present appeal has great significance as to the continued attempt by New York to practice economic protectionism and as to the question whether the enormous burden of proving "discriminatory" intent is to be required in order to overcome state exclusionary action with candidly economic ends. The decision below presents many significant issues warranting review by this Court.

CONCLUSION

For the foregoing reasons probable jurisdiction should be noted and the judgment reversed.

Dated: New York, New York
October 9, 1978

Respectfully submitted

MICHAEL LESCH
Shea Gould Climenko & Casey
330 Madison Avenue
New York, New York 10017
(212) 661-3200
Attorneys for Tuscan Dairy Farms, Inc., Appellant

Of Counsel

MILTON S. GOULD
MICHAEL LESCH
SANFORD A. BELL
DALE C. CHRISTENSEN, JR.

Appendices

APPENDIX A

Opinion and Judgment Appealed From

In the Matter of TUSCAN DAIRY FARMS, INC., Appellant, v J. ROGER BARBER, as Commissioner of Agriculture and Markets of the State of New York, Respondent.

Argued June 1, 1978; decided July 11, 1978

OPINION OF THE COURT

JONES, J.

We hold in this case that the denial by the Commissioner of Agriculture and Markets of a license to extend delivery of milk on a wholesale basis into the County of Richmond to a New Jersey dealer already licensed to supply and supplying milk in other counties of the State did not violate the commerce clause of the United States Constitution.[1]

The dealer appeals as of right on constitutional grounds in a proceeding pursuant to CPLR article 78 from a judgment of the Appellate Division which unanimously confirmed the determination by the commissioner, after a hearing, denying petitioner's application for an extension of its milk dealer's license into Richmond County and dismissed the petition which sought annulment of the denial.

Petitioner Tuscan, a New Jersey corporation, is a processor and seller of milk and milk products doing business in New Jersey, New York, Delaware, Pennsylvania and Massachusetts. It holds a milk dealer's license issued by the Department of Agriculture and Markets of the State of New York and for some 20 years has made wholesale deliveries of milk and milk products into Orange and

1. (US Const, art I, § 8, subd 3.)

Rockland Counties and deliveries of other dairy products in most of the remaining counties in the State. Its present business in the State is wholesale only, and its customers include supermarkets, institutional outlets serving schools and hospitals, and the so-call "mom and pop stores".

After Pathmark, one of the supermarket chains to which it delivered its products in New Jersey, had requested it to undertake supplying the chain's stores on Staten Island (Richmond County), on May 28, 1975 petitioner filed an application for an extension of its milk dealer's license with the Commissioner of Agriculture and Markets of this State so that it might make deliveries at wholesale in that county. In accordance with section 258-c of the Agriculture and Markets Law, governing the licensing of milk dealers,[2] on July 15, 1975 a hearing was held, at which witnesses and exhibits were presented by petitioner and by the Department of Agriculture and Markets, directed to the questions "whether the issuance of the license extension will tend to a destructive competition in a market already adequately served, or the issuance is in the public interest; and whether the applicant is qualified by character or experience or financial responsibility or equipment properly to conduct the proposed business".

2. Section 258-c of the Agriculture and Markets Law, insofar as relevant, provides: "No license shall be denied to a person not now engaged in business as a milk dealer, or for the continuation of a now existing business, and no license shall be denied to authorize the extension of an existing business by the operation of an additional plant or other new additional facility, unless the commissioner finds by a preponderance of the evidence, after due notice and opportunity of hearing to the applicant or licensee, one or more of the following: (1) that the applicant is not qualified by character or experience or financial responsibility or equipment properly to conduct the proposed business * * * (2) that the issuance of the license will tend to a destructive competition in a market already adequately served; or (3) that the issuance of the license is not in the public interest."

The department presented nine witnesses, one of whom was a statistician who introduced and explained figures produced by a milk market survey of Richmond County conducted in the year prior to the hearing; the remaining witnesses were officers or employees of milk distributors already licensed to serve and which were serving Richmond County, who testified in detail as to the nature and extent of business each was doing there and as to the competition existing and its consequences, as well as the consequences of the entry of a new distributor into the area. Petitioner offered no testimony on these subjects and produced only three witnesses: an employee of its customer Pathmark, who testified concerning the request made to petitioner to begin distribution in Richmond County; petitioner's accountant, who attested to the firm's financial reports; and petitioner's chairman of its board, who described its operations, licenses and equipment. At the close of the hearing petitioner requested and was granted the right to call additional witnesses at a later session of the hearing; however, petitioner subsequently advised that no further witnesses would be called and the hearing was not resumed. Thereafter respondent commissioner, with the consent of petitioner, acting without a report by the hearing officer (who had transferred from the department) but on the basis of the transcript and exhibits, made a determination denying the license application on finding that granting petitioner's application for an extension to serve at wholesale in Richmond County "would tend to a destructive competition for milk sales in a market already adequately served and as such would not be in the public interest". The commissioner further found that it could "not be concluded that applicant's request for extension of its milk dealer's license to Richmond County should be denied for reason of char-

acter or experience or financial responsibility or equipment properly to conduct the proposed business".

Petitioner has thus far sought without success to overturn the commissioner's denial of its application for an extension of license. On its present appeal it sets out two challenges: (1) that the commissioner's determination is not supported by a preponderance of the evidence before him as required by section 258-c of the Agriculture and Markets Law, and (2) that the commissioner's application of the statute to petitioner in this case violates the commerce clause of the United States Constitution.

Specifically, the commissioner concluded: "The entry of another substantial processor-distributor of milk to Richmond County with primary interest in serving larger-volume supermarket accounts would under existing circumstances, tend to a destructive competition for sales of milk. It is concluded that there would be considerable pressure exerted by the applicant to establish a foothold in the market. This, along with the likelihood of competitive reaction by established dealers, would have a price-depressing effect on the market with destructive impact upon medium-size and smaller-volume milk dealers. These dealers perform an important function. The public interest requires that a balanced milk distribution structure be maintained in the market, so that service on retail home delivery routes and service to small volume wholesale customers is readily available. This type of service entails much higher unit costs than service to high volume supermarket accounts. There is an inevitable tendency for the larger milk dealers to attempt to skim the profitable supermarket accounts and neglect service to smaller volume accounts. The applicant does not perform any retail home delivery services. The public interest in maintaining a

balanced milk distribution structure within Richmond County, adequate to serve all the needs of the market, would not be served by granting the application for extension."[3] The commissioner then determined "that granting the application of Tuscan Dairy Farms Inc. for extension of its milk dealer's license to serve at wholesale in Richmond County would tend to a destructive competition for milk sales in a market already adequately served and as such would not be in the public interest".

We agree with the Appellate Division that this determination is supported by a preponderance of the evidence before the commissioner. Several of the milk distributors summoned by the department who variously serviced small stores, luncheonettes, fruit and vegetable stands and retail home customers, recited statistics which showed a decline in milk distribution business in the preceding two years. The distributor doing the largest volume of business in the area had closed its pasteurizing plant in Richmond County three months before the hearing due to a lack of sufficient volume to operate the plant efficiently. There was ample testimony of intense competition and price wars in the sale of milk in Richmond County and proof that each time a new distributor entered the area a price competition ensued as a result of the entrant's attempt to build a market for itself by undercutting existing prices followed by the responsive reduction in prices, first by the outlets being serviced by the newcomer, then by competitors of those outlets and their suppliers. A distributor serving "mostly little deli's and the mom and pop stores", also engaged in retail delivery of milk, testified that such price competition not only caused the mom and pop stores to suffer badly

3. A related conclusion by the commissioner that "the market is already adequately served" is not challenged by petitioner.

but that his own business suffered because he had to sell milk more cheaply in order to sell it at all, so that the sale of milk at the time when there was a price war caused by a new supplier was not profitable and "we are just trying to hold our heads above water". His statement that he was nevertheless going to continue in his business was apparently explained by his remark "I have been lucky. I have managed to pick up a couple of good stores." Additionally, there was testimony by the manager of the distributor that had recently entered the area and which served only small outlets that it was finding the competition "very tough" and had acquired fewer customers than it had anticipated when it had been licensed. He stated that retail home delivery business requires much more mileage on the distributor's trucks than does store business, which is a direct run.

As previously indicated, petitioner produced no evidence of its own as to the consequences which might be expected to follow the licensing of an additional distributor. It now attempts only to impeach the probative worth of the testimony of the department's witnesses, emphasizing their position as potential competitors of petitioner whose testimony should be subjected to particular scrutiny by reason of that circumstance.

As a public official with expertise in the area of marketing and distribution of dairy products, the commissioner found that the public interest requires the maintenance of a balanced distribution system, including availability of service to retail home delivery routes and small volume wholesale customers. The direct evidence, together with the inferences reasonably to be drawn therefrom, supports the conclusion that introduction in Richmond County of a new distributor of milk to supermarkets only—with adverse

effect on distributors presently serving small retailers and themselves engaged in retail sales—would tend to a competition for milk sales which would be destructive by reason of the potential disturbance of the balanced distribution structure. The licensing of petitioner to enable it to serve its customer Pathmark, a supermarket chain, would do nothing to counteract this disturbance, inasmuch as it was the maintenance of distribution to small outlets and retail sellers that would be jeopardized, and no proof was offered that petitioner would serve those outlets and sellers. Such proof as there was, was to the contrary. Thus, to the extent that petitioner challenges the commissioner's observation and reliance on the fact that petitioner does not itself render any retail home-delivery services, it is notable that this fact was testified to by one of petitioner's own witnesses and that petitioner offered no proof whatsoever that it desired or intended to service other than supermarkets in Richmond County. In its brief petitioner even now stresses that its application was limited to sales "at wholesale".

On the basis of the evidence introduced by the department, taken with the petitioner's failure to offer any countervailing evidence, we reject petitioner's argument that the commissioner's determination was not supported by the preponderance of the evidence before him.

Turning then to petitioner's claim that the commissioner's determination violates the commerce clause of the Federal Constitution, we look to the decisions and opinions of the Supreme Court of the United States. We find no decision of that court which is squarely dispositive. The cases which have upheld State regulation of commerce in milk and dairy products against challenges under the commerce clause have presented predominantly issues of local

price regulation, and are thus distinguishable from the present case. In *Highland Farms Dairy* v. *Agnew* (300 US 608) the licensing requirement of a Virginia milk control statute and the milk prices fixed by the commissioner created under the statute were found by provisions of the law itself and by the commissioner's application thereof to be inapplicable to a challenging interstate milk distributor. In *Milk Bd. v. Eisenberg Co.* (306 US 346) it was held that Pennsylvania's statutory economic regulation of its local milk industry, including the licensing and bonding of milk dealers and the establishment of prices paid to producers, could constitutionally be applied to milk dealers engaged exclusively in interstate commerce. In *State v. Pure Vac Dairy Prods. Corp.* (251 Miss 457, app dsmd for want of a *Federal question sub nom. Pure-Vac Dairy Prods. Corp. v. Mississippi ex rel. Patterson*, 382 US 14) the application of a Mississippi milk price control statute to a Tennessee producer shipping milk into Mississippi for sale there was approved. In *United Dairy Farmers v. Milk Control Comm.* (404 US 930) the Pennsylvania milk control law was again upheld, this time against claims that it deterred out-of-State producers from shipping milk into Pennsylvania. Similarly, from the opposite view, none of the cases discussed below, in which State regulation of the milk industry has been struck down, has presented a factual context or regulation of a sort comparable to that in the present case.

Petitioner does not dispute that the milk industry within the State is a proper subject for regulation under the State's police power (e.g., *Nebbia v New York*, 291 US 502). It contends, however, that, when the purpose of the exercise of the State's authority is economic regulation, any obstruction of interstate commerce—whether direct or indirect, substantial or incidental—is invalid under the commerce

clause. As a consequence, it urges that the Appellate Division erred when petitioner contends, it applied a balancing of interests test—weighing the effect on interstate commerce against local benefit—and upheld the commissioner's denial of the opportunity to petitioner to distribute milk at wholesale in Richmond County.[4]

There is unquestioned authority, on which petitioner relies, for the proposition that legislation enacted solely for the protection of local economic interests by the restriction of competition from without the State is inherently unconstitutional. Thus, in *Baldwin* v. *G. A. F. Seelig* (294 US 511) the Supreme Court held invalid a New York regulation which prohibited the sale of milk imported from other States, there Vermont, unless the purchase price paid to the out-of-State farmer was at least equal to that paid to New York farmers. The regulation, which the Supreme Court in a subsequent case described as "an enactment aimed solely at interstate commerce attempting to affect and regulate the price to be paid for milk in a sister state" (*Milk Bd.* v. *Eisenberg Co.*, 306 US 346, 353, *supra*), was denounced as a tariff barrier hostile to the national economic solidarity.

"The argument is pressed upon us, however, that the end to be served by the Milk Control Act is something more than the economic welfare of the farmers or of any other class or classes. The end to be served is the maintenance of a regular and adequate supply of pure and wholesome milk, the supply being put in jeopardy when the farmers of the state are unable to earn a living income. *Nebbia* v. *New*

4. No contention is advanced by petitioner that the protection the commissioner seeks to accord the milk distribution system in Richmond County could have been promoted by any alternative means having a lesser impact on interstate activities.

York, supra. Price security, we are told, is only a special form of sanitary security; the economic motive is secondary and subordinate; the state intervenes to make its inhabitants healthy, and not to make them rich. On that assumption we are asked to say that intervention will be upheld as a valid exercise by the state of its internal police power, though there is an incidental obstruction to commerce between one state and another. This would be to eat up the rule under the guise of an exception. Economic welfare is always related to health, for there can be no health if men are starving. Let such an exception be admitted, and all that a state will have to do in times of stress and strain is to say that its farmers and merchants and workmen must be protected against competition from without, lest they go upon the poor relief lists or perish altogether. To give entrance to that excuse would be to invite a speedy end of our national solidarity. The Constitution was framed under the dominion of a political philosophy less parochial in range. It was framed upon the theory that the peoples of the several states must sink or swim together, and that in the long run prosperity and salvation are in union and not division." *(Baldwin* v. *G. A. F. Seelig,* 294 US 511, 522-523, *supra.)*

Fourteen years later *Hood & Sons v Du Mond* (336 US 525) involved the denial under section 258-c of the Agriculture and Markets Law of a license sought by a Massachusetts corporation for construction in New York of a milk receiving depot at which raw milk would [sic] collected for shipment to Boston. Invalidating the denial of license the Supreme Court found that it had been "for *the avowed purpose* and with the practical effect of curtailing the volume of interstate commerce to *aid local economic interests*" (336 US, pp 530-531; emphasis added).

Similarly in *A & P Tea Co. v Cottrell* (424 US 366) the court struck down the denial of a Louisiana milk producer's permit to distribute in Mississippi milk products from Louisiana, which denial was predicated on the absence of a reciprocity agreement with respect to sales of milk between the States of Louisiana and Mississippi, action prompted by an evident concern for the economic welfare of milk dealers in the regulating State. Applying a balance of interests test, the court found unconstitutional the total prohibition of entry of foreign milk used as a weapon to force a sister State into a reciprocity agreement.

Each of the cases discussed, as well as others also relied on by petitioner, involved State action that was found to have had as its avowed purpose the exclusion of competition from out of State for the protection of the economic well-being of the milk industry within the State. Additionally, in the *Baldwin* and *A & P Tea Co.* cases the challenged action sought to affect, and, thus in a degree significantly to control, the commerce in milk in a State other than the regulating State. In *Baldwin,* it was New York's intention to affect commerce in milk in Vermont; in *A & P Tea Co.* it was Louisiana's intention to affect commerce in milk in Mississippi.

Quite a different situation is presented by the case now before us. Of cardinal and distinguishing significance, which petitioner would have us overlook, is the fact that the commissioner's denial of the license sought by petitioner did not have as its objective the economic protection of the milk industry of New York State, or even that of the County of Richmond. The commissioner's concern in this instance was addressed rather to the maintenance of the existing "balanced milk distribution struc-

ture", and particularly that portion of the present distribution system which provides "service on retail home delivery routes and service to small volume wholesale customers," the small outlets and the mom and pop stores, which individually and collectively serve consumer needs not met by supermarkets and warehouse-type outlets. "The public interest requires that a balanced milk distribution structure be maintained in the market, so that service on retail home delivery routes and service to small volume wholesale customers is readily available." Because petitioner's interest is in distribution only through supermarkets and wholesale outlets, its entry into Richmond County would not contribute to the maintenance of such a balanced distribution system or provide services equivalent to those now available to the consumers. Thus, the denial of license here is not for the benefit of the dealers and distributors presently serving the market, but for the protection of the welfare of the customers, in the public interest. Although it may be assumed that the denial of a license to a new supplier seeking to break into the market area will incidentally provide a measure of economic protection to businesses already operating within the existing system (whether engaged in interstate or intrastate commerce), this intermediate consequence should not serve to abrogate the ultimate, legitimate objective of preserving a distribution system necessary to serve the varied needs of milk consumers in Richmond County, when economic protection of the local industry was not the purpose which the denial sought to accomplish.

The possibility of incidental economic benefit to the present milk industry should not be fatal to the validity of State regulation for consumer protection particularly when, as here, the determination implementing the objective was not dependent on the fact that petitioner's product, if permitted, would be shipped from an out-of-State source. Thus—and closely related to the absence of a motive to protect local industry—the denial of petitioner's application was not in pursuit of an exclusion of or discrimination against competition originating without the State (cf. *City of Philadelphia v. New Jersey*—US—, 46 USLW 4801). So far as appears, petitioner's status as a New Jersey corporation proposing to ship milk from outside the State into the metropolitan New York area was in no way a factor on which the challenged determination was grounded. No prohibition of goods traveling across State borders was sought to be accomplished; the restriction was only against the particular method of distribution of milk in Richmond County, whether the milk came from within or without the State. Nothing suggests that the negative response petitioner's application received would have been any different had the applicant been a New York wholesaler seeking to distribute milk produced and processed within New York. The fact that the denial of the application resulted in exclusion from the Richmond County market of milk which would have been shipped in interstate commerce was only a happenstance occasioned by the identity of this applicant; it was not the *raison d'etre* of the commissioner's action. There was testimony that at least one supplier presently operating in Richmond County is, like petitioner, based in New Jersey. Petitioner itself is licensed and conducts extensive business in New York, engaged as it is in wholesale distribution of milk or milk products in most of the counties of the State. (Cf. *Exxon Corp. v. Governor of Md.*, —US—,—, 46 USLW 4662, 4665.)

Section 258-c of the Agriculture and Markets Law on its face does not discriminate with respect to the activities of

intrastate and out-of-State suppliers as tending to a destructive competition in a market already adequately served, on the basis of which licensing may be withheld. No reference is made in the statute to the source of the competition, whether from within the State or without. That the absence of such a distinction is a significant factor in viewing applications of the statute adverse to an out-of-State dealer, see *Panhandle Co. v Michigan Comm.* (341 US 329, 337). Moreover, and equally significant, nothing in the record indicates that the commissioner's application of the statute in this instance or in general has been other than evenhanded in treatment of interstate and intrastate commerce alike.

Finally there is no suggestion—and could be none—that the statute or its application to petitioner represents any attempt at extraterritorial control of trade or commerce. Unlike *Baldwin* (294 US 511, *supra*) and *A & P Tea Co.* (424 US 366, *supra*) there is here no aspiration to affect or regulate the milk industry outside the boundaries of New York. In *Baldwin* the intention and consequence of the New York regulation was to maintain the level of prices paid for milk in Vermont. In *A & P Tea Co.* the intention and consequence of Louisiana's regulation was to open the markets of Mississippi to Louisiana milk. Unlike *Hood,* in which the result of New York regulation would have been to interfere with the supply of milk to Boston, there is here no demonstrated impact on a milk market outside the borders of New York State. In the present instance, neither by intention nor by consequence, by exclusionary requirement or by enticement, is there any demonstrated influence on the sale of milk in New Jersey or in any other State. The denial of distributor's license under section 258-c focuses entirely on the community sought to be served

by the applicant and on the protection of the present balanced milk distribution structure for consumer benefit.

We recognize that the denial of this New Jersey petitioner's application to distribute milk on a wholesale basis in Richmond County has some incidental effect on interstate commerce. Balancing this incidental impact against the interest of the State of New York in protecting milk consumers in Richmond County, however, we conclude that where the purpose and goal of the restriction employed is consumer protection and not the economic well-being of the present milk industry, and the means chosen does not involve an attempt to control commerce in another State or otherwise to produce an extraterritorial effect and does not operate to discriminate against or place an embargo on interstate commerce, the obvious local interest at stake outweighs whatever national interest there might be in the prevention of the State restrictions *(Cities Serv. Co. v Peerless Co.,* 340 US 179, 186-187). In the analysis most recently articulated by the Supreme Court in *A & P Tea Co. v Cottrell* (424 US 366, 371-372, *supra),* if a court finds that a challenged exercise of local power serves to further a legitimate local interest but simultaneously burdens interstate commerce, it is confronted with a problem of balance. The general rule which then becomes applicable can be phrased as follows (424 US, pp 371-372): "Where the statute regulates evenhandedly to effectuate a legitimate local public interest, and its effects on interstate commerce are only incidental, it will be upheld unless the burden imposed on such commerce is clearly excessive in relation to the putative local benefits. * * * If a legitimate local purpose is found, then the question becomes one of degree. And the extent of the burden that will be tolerated will of course depend on the nature of the local interest involved,

and on whether it could be promoted as well with a lesser impact on interstate activities." (Cf. *City of Philadephia v New Jersey,* — US —, 46 USLW 4801, *supra.)* We conclude that the denial of petitioner's application for an extended license in the present instance passes this test.

One further word should be written with respect to *Hood & Sons v. Du Mond* (336 US 525, *supra*), a case heavily relied on by petitioner. Examination of the record in that case, and particularly the findings of fact and conclusion of the then Commissioner of Agriculture and Markets, reveals that the concern there was wholly with protection for local milk dealers; there was no aspect of attention to consumer protection, the motivating objective in the present case. The testimony before the commissioner was as to possible shortages of milk supply to the local dealers rather than to consumers. The commissioner concluded that the three milk plants near the site of Hood's proposed new plant had "the capacity to handle more milk than they are now handling", and "that one of the factors affecting the economy of operating county milk plants, is the volume of milk handled, * * * 'In each case the volume of milk received at the individual plants was by far the most important factor affecting the cost per 100 pounds.'" The summary conclusion was

"If applicant is permitted to equip and operate another milk plant in this territory, and to take on producers now delivering to plants other than those which it operates, it will tend to reduce the volume of milk received at the plants which lose those producers, and will tend to increase the cost of handling milk in those plants.

"If applicant takes producers now delivering milk to local markets such as Troy, it will have a tendency to

deprive such markets of a supply needed during the short season."

Thus, the focus of the commissioner's attention was exclusively on the adverse impact which the erection of a new plant in the area would have on the existing milk *plants. Baldwin* had previously established that economic disadvantage generally to the milk industry could not be accepted as justification for burdening interstate commerce, even though it could be argued that "the maintenance of a regular and adequate supply of pure and wholesome milk" (294 US, p 523, *supra*) might thereby be put in jeopardy. Thus, economic protection of milk dealers, the objective of the denial of the license in *Hood,* would not support the State regulation.

One looks in vain in *Hood* for any translation of economic disadvantage to dealers into injury to customers The commissioner's determination does not mention consumers; the opinions in our court (297 NY 209) and in the Supreme Court (336 US 525) do not mention or address the subject of consequences to consumers or consumer protection. Thus, it is entirely understandable that the Supreme Court there concluded that the restriction was (p. 530) "imposed for the avowed purpose and with the practical effect of curtailing the volume of interstate commerce to aid local economic interests." It is determinative that in the present case, the objective of the commissioner's action was the maintenance of a balanced milk distribution structure for the protection of the consumer-public, not the erection of parochial barriers to safeguard the economic well-being of local dealers. Additionally, in *Hood* the denial of the desired license would have had the inevitable extraterritorial effect of interfering with the distribution of milk in the Boston area, a factor of out-of-State impact

for which there has been no demonstrated counterpart in the present case.

For the reasons stated, the judgment of the Appellate Division should be affirmed, with costs.

JASEN, J. (dissenting). I cannot agree with the majority's conclusion that the commissioner's denial of a license to permit appellant to serve wholesale milk dealers in Richmond County did not offend the commerce clause of the United States Constitution. (Art. I, § 8, subd 3.)

No one will deny the authority of each State to regulate, pursuant to its police power, intrastate business for the protection of its citizens' health, safety, morals and general welfare, notwithstanding that such regulation effects an incidental burden upon interstate commerce. (*Baldwin v G. A. F. Seelig,* 294 US 511, 512.) Provided a State statute "regulates evenhandedly to effectuate a legitimate local public interest, and its effects on interstate commerce are only incidental", the Supreme Court has recently observed, "it will be upheld unless the burden imposed on such commerce is clearly excessive in relation to the putative local benefits." (*A & P Tea Co. v Cottrell,* 424 US 366, 371-372, quoting *Pike v Bruce Church, Inc.,* 397 US 137, 142.)

Clearly, however, before the balancing approach advocated by the court in *A & P Tea Co.* may be employed to determine the constitutionality of a State statute affecting interstate commerce, there must be a showing that the challenged statute effectuates a "legitimate local public interest". While, as the majority correctly notes, the milk industry is an appropriate subject for regulation under the police power of the State (*Nebbia v New York,* 291 US 502), distinction has long been made between State legislation designed to foster public health and safety, and legislation intended to insulate local inhabitants from

unfavorable economic competition attributable to interstate commerce. (E.g., *Hood & Sons v Du Mond,* 336 US 525; *Milk Bd. v Eisenberg Co.,* 306 US 346; *Baldwin v G.A.F. Seelig,* 294 US 511, *supra.*)

In this regard, the Supreme Court has on a previous occasion, in *Hood & Sons v Du Mond (supra),* held unconstitutional, as applied, the very same statutory provision at issue today. In so doing, the court made clear that a State may not enact legislation burdening interstate commerce under the guise of a health measure for the true purpose of suppressing competition. (336 US, at p 538, *supra.*) Yet, the majority seeks to distinguish this case upon the theory that the constitutional infirmity in *Hood* stemmed from the fact that the commissioner premised his license denial upon a finding that operation of an additional milk receiving plant at the requested location would occasion the reception of a lower volume of milk by existing area plants, resulting in a decrease in operational efficiency—an economic, rather than health-related, interest. In marked contrast, maintains the majority, stands the present case, in which the commissioner premised his license denial not upon fear of the possibly debilitating effect competition might work upon the milk industry, but upon concern for the consumer. This concern for the consumer is alleged to have been brought about by the nature of appellant's business—the distribution of milk exclusively to supermarkets and wholesale outlets—which, in the commissioner's judgment, would not contribute to a balanced milk distribution system. For this reason, the majority concludes that the commissioner's decision was "not for the benefit of the dealers and distributors presently serving the market, but for the protection of the welfare of the consumers, in the public interest" (p 226).

I do not find this distinction persuasive. At the root of the commissioner's rationale lies the basic fear that appellant's entrance into the Richmond County milk market might, through competition, jeopardize the continued existence of milk distributors who service small volume wholesale customers, as well as making retail home deliveries necessary for consumer distribution. In my opinion, this reasoning constitutes nothing more than a subtle variant of the bootstrap argument that regulation of competition—an impermissible local interest—will in itself contribute to health—a permissible local interest. Needless to say, the Supreme Court has consistently rejected this argument. (See, e.g., *Hood & Sons v Du Mond*, 336 US 525, 538, *supra; Baldwin v G.A.F. Seelig*, 294 US 511, 522-523, *supra; Buck v Kuykendall*, 267 US 307, 315-316.) Particularly appropriate is *Baldwin v G.A.F. Seelig (supra*, at pp 522-523), from which the majority quotes the following (at p 224): "The argument is pressed upon us, however, that the end to be served by the Milk Control Act is something more than the economic welfare of the farmers or of any other class or classes. The end to be served is the maintenance of a regular and adequate supply of pure and wholesome milk, the supply being put in jeopardy when the farmers of the state are unable to earn a living income. *Nebbia v. New York, supra.* Price security, we are told, is only a special form of santiary security; the economic motive is secondary and subordinate; the state intervenes to make its inhabitants healthy, and not to make them rich. On that assumption we are asked to say that intervention will be upheld as a valid exercise by the state of its internal police power, though there is an incidental obstruction to commerce between one state and another. This would be to eat up the rule under the guise of an exception."

In my opinion, this admonition is equally applicable to the present case. To hold section 258-c of the Agriculture and Markets Law constitutional, as applied would be to burden interstate commerce to effectuate a primarily economic objective under the guise of a health measure. For this reason, I would reverse the judgment of the Appellate Division and declare section 258-c of the Agriculture and Markets Law unconstitutional, as applied.

Chief Judge Breitel and Judges Gabrielli, Wachtler, Fuchsberg and Cooke concur with Judge Jones; Judge Jasen disssents and votes to reverse in a separate opinion.

Judgment affirmed.

Opinion and Judgment Appealed From

COURT OF APPEALS
STATE OF NEW YORK

The HON. CHARLES D. BREITEL, *Chief Judge, Presiding*

No. 331

In the Matter of
TUSCAN DAIRY FARMS, INC.,
Appellant,

vs.

J. ROGER BARBER, as Commissioner of Agriculture and Markets of the State of New York,
Respondent.

The appellant in the above entitled appeal appeared by Shea Gould Climenko & Casey; the respondent appeared by Thomas G. Conway.

The Court, after due deliberation, orders and adjudges that the judgment is affirmed, with costs. Opinion by Jones, J. All concur except Jasen, J., who dissents and votes to reverse in an opinion.

The Court further orders that the papers required to be filed and this record of the proceedings in this Court be remitted to the Supreme Court, Albany County, there to be proceeded upon according to law.

I certify that the preceding contains a correct record of the proceedings in this appeal in the Court of Appeals and that the papers required to be filed are attached.

JOSEPH W. BELLACOSA

Joseph W. Bellacosa,
Clerk of the Court

Court of Appeals, Clerk's Office, Albany, July 11, 1978.

Opinion and Judgment Appealed From

STATE OF NEW YORK
COUNTY OF ALBANY CLERK'S OFFICE } ss.:

I, GUY D. PAQUIN, Clerk of the said County, and also Clerk of the Supreme and County Courts, being Courts of Record held therein, Do HEREBY CERTIFY that I have compared the annexed copy Remittitur with the original thereof filed in this office on the 14 day of July 1978 and that the same is a correct transcript therefrom, and of the whole of said original.

IN TESTIMONY WHEREOF, I have hereunto set my name and affixed my official seal, this 6 day of Oct 1978.

GUY D. PAQUIN

Clerk

[SEAL]

APPENDIX B

Opinion and Order of Appellate Division, Third Department

In the Matter of TUSCAN DAIRY FARMS, INC., Petitioner, v J. ROGER BARBER, as Commissioner of Agriculture and Markets of the State of New York, Respondent.

Third Department, August 4, 1977

SWEENEY, J. P. The facts are not in dispute. Petitioner, a New Jersey corporation, has possessed a New York State milk dealers' license for some 20 years. It sells and delivers milk in several States, including New York. On May 28, 1975 it filed an application for extension of its New York license to sell at wholesale in several additional counties, including Richmond. After a hearing respondent denied the application pursuant to section 258-c of the Agriculture and Markets Law concluding that an extension of petitioner's license to include Richmond County would tend to a destructive competition of milk sales in a market already adequately served and as such would not be in the public interest. Such determination precipitated the instant article 78 proceeding.

Basically, petitioner urges two grounds for annulment. It contends the denial contravenes the commerce clause of the United States Constitution and that the record does not support respondent's determination.

We will consider the latter contention first. Unlike our review in most administrative proceedings, we are not here limited to a determination of whether there is substantial evidence to sustain the determination (*Matter of Echelman v Du Mond*, 283 App Div 276). Rather, we must determine whether respondent's determination is supported by a preponderance of the evidence. While a large part of respondent's proof consisted of testimony of milk

dealers already operating in Richmond County and it might be argued that they desired to prevent additional competition, we are of the view, considering the record in its entirety, that the determination is supported by a preponderance of the evidence (*Matter of Brucato v Wickham*, 28 AD2d 780). Consequently, we should not disturb it unless petitioner can prevail on the other issue raised.

The State has the authority, in the exercise of its police power, to regulate the milk industry (*Nebbia v New York*, 291 US 502). Our concern is whether such regulation impermissibly interferes with interstate commerce. While most regulations affecting the movement of goods interfere to some extent with interstate commerce not all run counter to the commerce clause. If the activity regulated is predominately local in nature and only indirectly or incidentally burdens interstate commerce, it is permissible (*Milk Bd. v Eisenberg Co.*, 306 US 346). A resolution of the nature of the activity is often determined by a balancing of interests (*California v Zook*, 336 US 725, 728). Another test was expressed in *Pike v Bruce Church, Inc.* (397 US 137, 142) as follows: "Where the statute regulates evenhandedly to effectuate a legitimate local public interest, and its effects on interstate commerce are only incidental, it will be upheld unless the burden imposed on such commerce is clearly excessive in relation to the putative local benefits." A reading of the statute in question demonstrates to us that its regulation of the milk industry is evenhanded. It makes no distinction between domestic and foreign applicants or between domestic and foreign products.

An analysis of the statute as applied to the present undisputed facts in light of well-established principles of

law, compels us to conclude that there is no violation of the commerce clause. One of the purposes of the instant statute is to prevent destructive competition which is a permissible exercise of the police power (*Nebbia v New York*, 291 US 502, *supra*) and, in our opinion, serves a legitimate local public interest. The record demonstrates that petitioner has not been prohibited from selling milk products in New York State, and has, in fact, been so engaged for some 20 years. Nor is there a general restriction prohibiting petitioner from the distribution of milk products brought into the State from without. Petitioner may sell and distribute milk supplies brought in from New Jersey in any of the counties of New York State where it has a license. In our view, the effect on interstate commerce is incidental and the burden imposed on such commerce is not excessive in relation to the derivative local benefits. Consequently, we find that the application of the statute in question in the present case does not violate the commerce clause of the United States Constitution. Additionally, we conclude that application of the balancing of interests test produces the same result. .

Petitioner's reliance on *Baldwin v G. A. F. Seelig, Inc.* (294 US 511) and *Hood & Sons v Du Mond* (336 US 525) is misplaced. In *Baldwin* the statute in question attempted to fix the price of milk in Vermont. Such action imposed a direct burden on interstate commerce and was impermissible. The determination considered in *Hood* clearly discriminated against the foreign market in favor of the local one. Such discrimination was also impermissible. Neither circumstance prevails in the instant case.

The determination should be confirmed, and the petition dismissed, without costs.

KANE, MAIN, LARKIN and HERLIHY, JJ., concur.

Determination confirmed, and petition dismissed, without costs.

At a Term of the Appellate Division of the Supreme Court of the State of New York, held in and for the Third Judicial Department, at the Justice Building in the City of Albany, New York, commencing on the 16th day of May, 1977.

PRESENT:

HON. MICHAEL E. SWEENEY,
Justice Presiding,
HON. T. PAUL KANE,
HON. ROBERT G. MAIN,
HON. JOHN L. LARKIN,
HON. J. CLARENCE HERLIHY,
Associate Justices.

TUSCAN DAIRY FARMS, INC.,
Petitioner,

For judgment pursuant to the provisions of Article 78 of the Civil Practice Law and Rules,

against

J. ROGER BARBER, as Commissioner of Agriculture and Markets of the State of New York,
Respondent.

Index No. 5803-76

The petitioner, Tuscan Dairy Farms, Inc. having commenced a proceeding pursuant to Article 78 of the Civil Practice Law and Rules for a judgment annuling a determination, dated May 3, 1976, of the respondent, J. Roger Barber as Commissioner of Agriculture and Markets of the State of New York, and said proceeding having been transferred for disposition to the Appellate Division of the Supreme Court, Third Department, by an Order of the

Opinion and Order of the Appellate Division, Third Department

Supreme Court, Special Term at Albany, entered on the 28th day of September, 1976 in the Office of the Clerk of the County of Albany and said proceeding having been presented during the above-stated term of this Court, and having been argued by Shea, Gould, Climenko & Casey (Milton S. Gould, Esq., of Counsel) for petitioner, and by Thomas G. Conway, Esq., counsel for respondent, and, after due deliberation, the Court having rendered a decision on the 4th day of August, 1977, it is hereby

ORDERED that the determination of the respondent be and hereby is confirmed and the petition dismissed, without costs.

Enter:

/s/ JOHN J. O'BRIEN
Clerk

Dated and Entered: August 18, 1977.

APPENDIX C

Determination of Department of Agriculture and Markets

STATE OF NEW YORK
DEPARTMENT OF AGRICULTURE AND MARKETS
DIVISION OF DAIRY INDUSTRY SERVICES

In the matter of the Application of TUSCAN DAIRY FARMS, INC., 750 Union Avenue, Union, New Jersey 07083, for an Extension of its Milk Dealer's License No. 549 to permit it to serve wholesale customers in Richmond County

Memorandum, Findings of Fact, Conclusions and Determination

Memorandum

By application received at the Department on May 28, 1975, Tuscan Dairy Farms, Inc., hereinafter referred to as the applicant, applied for extension of its milk dealer's license to permit it to serve at wholesale in the counties of New York, Bronx, Kings, Richmond and Queens. Applicant holds a milk dealer's license issued by the Department.

On June 26, 1975, the Department issued a notice of hearing to the applicant, scheduling a hearing for July 15, 1975 at New York, New York to consider applicant's request for authorization to serve wholesale customers in Richmond County. Applicant agreed that other counties included in its request for an extension of its milk dealer's license would be considered at a later date. The hearing was called pursuant to Section 258-c of the Agriculture and Markets Law for the purpose of taking testimony and receiving evidence relating to the following:

> Whether the issuance of the license extension will tend to a destructive competition in a market already adequately served, or the issuance is in the public interest; and

Whether the applicant is qualified by character or experience or financial responsibility or equipment properly to conduct the proposed business.

The hearing was held on July 15, 1976 as scheduled before Jonathan Tell, Hearing Officer. Julius Braun, Attorney, presented for the Department, and the applicant was represented by Shea, Gould, Climenko, Kramer and Casey, Attorneys, by Kevin McGrath, Esq. and Martin B. McNamara Esq. At the close of the hearing on July 15, the applicant requested and was granted the right to call additional witnesses at a resumed session of the hearing. On September 3, 1975, the applicant's attorney wrote to the Department and indicated that no further witness would be presented. Accordingly, no further hearing sessions were scheduled. The Hearing Officer who presided at the hearing on July 15, 1975, subsequently transferred to a different Department. On March 8, 1976, the applicant's attorney stipulated and agreed that a hearing officer's report need not be filed and agreed that the Commissioners may proceed to render a Determination upon the basis of the transcript of the hearing and exhibits.

Findings of Fact

1. The milk dealer's license of the applicant permits it to sell and deliver milk at wholesale in Rockland and Orange Counties, and to sell sterilized cream and half and half, aseptically packaged in containers not to exceed one quart size, to other licensed dealers in New York State except for the counties of Erie, Niagara, Monroe and Orleans. Applicant has on occasion during the past three years been

charged by the Department with violations of the Agriculture and Markets Law. The violations were not considered cause for revoking the company's milk dealer license.

2. Applicant operates a large, well equipped milk processing plant at Union, New Jersey, convenient to Richmond County, New York (Staten Island). It has substantial sales and distribution of milk to supermarkets, schools, institutions and other wholesale outlets in New Jersey and New York. The applicant operates no retail home delivery routes in New York or elsewhere. Applicant's entire business consists in selling milk to wholesale accounts. Applicant obtains approximately 52 percent of its raw milk supply from New York State sources but only about 10 percent of its milk sales are in such state. It segregates its milk supply for sales in New York State in order to meet the New York butterfat standard which is higher than New Jersey's standard.

3. Applicant holds licenses or health permits from various states in the eastern part of the country to transport, process, manufacture or distribute milk or other dairy products. It is listed in the July 1, 1975 issue of Sanitation Compliance and Enforcement Ratings of Interstate Milk Shippers published by the U.S. Department of Health, Education and Welfare.

4. Applicant demonstrates satisfactory financial responsibility through statements showing substantial net worth and profitable operations.

5. Applicant was contacted by a chain supermarket customer which it serves in New Jersey to supply milk to 4

of the chain's stores in Richmond County. The chain is now served in Richmond County by two milk dealers who have generally provided satisfactory quality and service. A representative of the chain stated that it contacted the applicant about delivering milk to Richmond County because of a temporary problem with leaky containers and short coded merchandise received from one of the dealers now supplying its milk in such county. This witness indicated that price is not an important factor in seeking a new supplier for Richmond County because prices charged for milk by the various vendors from whom the chain buys differ little. Dollar sales of dairy products to the 4 stores in Richmond County are approximately $18,000 per week.

6. There are 10 milk dealers with unlimited license authorization to sell and deliver milk at wholesale in Richmond County. There are 13 other milk dealers who have limited wholesale rights in the county. The 23 milk dealers include some with substantial sales and distribution of milk throughout the Metropolitan New York area.

7. Two milk dealers, Weissglass Gold Seal Dairy Corporation and Sealtest Foods (Krafteo Corporation), closed milk processing plants in Richmond County during the past two years. Weissglass continues to be a major distributor of milk in the county, now having its milk processed and packaged at another New York City plant. In March 1973, a large-volume processor-distributor of milk, Elmhurst Dairy, was granted an extension of license to serve wholesale customers in Richmond County.

8. The population of Richmond County in 1970 was 295,443, an increase of approximately one-third from the

1960 census. Richmond County is the least populated of the New York City boroughs.

9. Eight milk dealers licensed for Richmond County testified at the hearing at the request of the Department. At least five of these dealers serve the entire county. The dealers who testified account for a large proportion of milk sales in Richmond County.

10. Deltown Foods operates two wholesale milk routes serving Richmond County. It delivers milk to all types of wholesale customers in the county 6 days a week from its processing plant at Yonkers, NY. Deltown's sales of milk in Richmond County have been relatively constant over the past two years, but its total volume of business in the New York Metropolitan area has declined. Farmlea-Westchester Dairy Co., another licensee in Richmond County, is a subsidiary company of Deltown Foods.

11. Rhinestone and Ebstein operate one milk delivery route in Richmond County, serving retail and small-volume wholesale customers in one area of such county. This dealer concentrates sales in one area of Richmond County for economy reasons. Milk is purchased by Rhinestone and Ebstein from another local milk dealer. Price competition from supermarkets has caused this dealer's volume of milk sales at wholesale to decline by 50 percent from the level of two years ago. The dealer's retail sales of milk are also down.

12. Dairylea Cooperative operates two wholesale delivery routes in Richmond County which sell approximately 11,000 quarts of milk a day to various types of wholesale customers in the area. Most of such milk is processed at

Dairylea's Woodside plant in Queens County, NY which is now operating at about two-thirds of its capacity. Overall, Dairylea sales of milk in the Metropolitan New York area are about the same as a year ago. This dealer carries on an extensive sales and advertising program but finds that Richmond County is a highly competitive area with respect to prices for milk.

13. Richmond Farms delivers milk 6 days a week to all areas of Richmond County from three wholesale routes. It does not now serve any chain supermarkets. Richmond Farms obtains its milk and dairy by-products from two milk dealers licensed for the county. During the past year, this dealer lost about one-third of its volume of milk sales in Richmond County, primarily because of losing two major hospital bids. Richmond Farms has also had its volume of milk sales decreased because of price competition and new stores opening which drained sales from its store customers. This dealer testified that recurring situations of depressed pricing of milk are common to Richmond County.

14. South Shore Dairy operates one milk route in Richmond County which serves primarily wholesale customers. Two years ago, this dealer operated two milk routes but dropped one because of declining home delivery sales. South Shore purchases its milk and by-products from a local dairy. This dealer has experienced keen price competition for sales to wholesale customers in Richmond County, especially when a new dealer enters the market. This has been the case with the recent entry of Elmhurst Dairy to Richmond County. Small milk dealers such as South Shore are also affected by fruit

and vegetable stands which use milk as a loss leader or promotional item.

15. Weissglass Gold Seal Dairy Corporation is the largest volume distributor of milk in Richmond County. It operates 13 wholesale delivery routes and 7 combination routes serving all types of wholesale customers as well as home delivery customers throughout the county. Weissglass' wholesale customers include many of the public and private schools in the county. This dealer recently closed its processing plant in Richmond County because the volume of business became too low for economical operation. Weissglass' sales of milk in Richmond County have declined from a year ago in part due to the loss of sales to chain supermarkets. This dealer has been affected by pricing competition from Elmhurst Dairy even though its milk is now processed by a subsidiary of Elmhurst. Weissglass finds that such price competition is typical with the entrance of a new competitor and continues at least until such competitor establishes itself in the market. Another cause of competitive instability is loss leader sales of milk by fruit and vegetable stands.

16. Elmhurst Milk and Cream was granted a license extension to serve Richmond County at wholesale on March 6, 1975. Since that time, it has developed one route serving the county. Milk is processed for Elmhurst at a subsidiary plant in Queens County, New York. This plant also processes milk for other dealers who distribute in Richmond County. Elmhurst has concentrated on soliciting the smaller volume wholesale customers in the county but has found pricing competition to be difficult and has been unable to fill the route.

17. Queens Farms Dairy has two wholesale routes in Richmond County, delivering milk to food stores and nursing homes. Its routes, like those of other dealers in the market, operate 6 days a week. Queens Farms has increased its sales of milk modestly in Richmond County during the past two years, but finds the level of prices to be relatively unprofitable. It considers milk prices in the county to be low compared to other New York City markets. Queens Farms operates a large milk processing plant in Queens County, supplying milk throughout the Metropolitan New York area.

18. Richmond County and the applicant's processing plant are both within the area regulated by the New York-New Jersey Milk Marketing Order. This Order regulates milk prices at the farm level only. The processing and distribution of packaged milk to wholesale and retail customers is not regulated by the Order. The Order establishes minimum prices milk dealers (handlers) are required to pay dairy farmers and cooperatives for raw milk. Charges or prices dealers pay farmers for milk over and above the minimum prices set by the Marketing Order may vary depending upon the negotiated agreement between the dealer and his suppliers of raw milk.

Conclusions

There is a substantial number of milk dealers licensed to sell and deliver milk to wholesale customers in Richmond County and such dealers are providing adequate service to the market. Ten milk dealers licensed for Richmond County are authorized to sell and distribute milk to wholesale accounts throughout the county. A

number of such dealers are large-volume processors and distributors of milk who can and do compete for and serve chain supermarkets with milk in the New York Metropolitan Area. The processing plants of some such dealers are not operating at full capacity and at least one plant in the county was recently closed by a dealer because it was not operating at an economical level. One large-volume dealer was recently granted a license extension for Richmond County and has become an important factor in competing for wholesale milk customers in the market. Prices of milk charged by milk dealers to store customers in Richmond County and the prices at which such stores are retailing milk are competitive for the New York Metropolitan Area. It is clear that the market is already adequately served.

The entry of another substantial processor-distributor of milk to Richmond County with primary interest in serving larger-volume supermarket accounts would under existing circumstances, tend to a destructive competition for sales of milk. It is concluded that there would be considerable pressure exerted by the applicant to establish a foothold in the market. This, along with the likelihood of competitive reaction by established dealers, would have a price-depressing effect on the market with destructive impact upon medium-size and smaller-volume milk dealers. These dealers perform an important function. The public interest requires that a balanced milk distribution structure be maintained in the market, so that service on retail home delivery routes and service to small volume wholesale customers is readily available. This type of service entails much higher unit costs than service to high volume supermarket accounts. There is an inevitable tendency for the larger milk dealers to attempt to skim the profitable super-

market accounts and neglect service to smaller volume accounts. The applicant does not perform any retail home delivery services. The public interest in maintaining a balanced milk distribution structure within Richmond County, adequate to serve all the needs of the market, would not be served by granting the application for extension.

On the basis of the record, it can not be concluded that applicant's request for extension of its milk dealer's license to Richmond County should be denied for reason of character or experience on financial responsibility or equipment properly to conduct the proposed business.

Determination

Now, therefore, in view of the above findings of fact and conclusions wherein it is found that granting the application of Tuscan Dairy Farms Inc. for extension of its milk dealer's license to serve at wholesale in Richmond County would tend to a destructive competition for milk sales in a market already adequately served and as such would not be in the public interest, it is ordered that the application of the same for extension of its milk dealer's license to permit it to serve wholesale customers in Richmond County should be and the same is hereby denied.

This order shall take effect immediately.

J. ROGER BARBER

J. Roger Barber
Commissioner of Agriculture and
Markets of the State of New York

Dated and Sealed at
Albany, New York this
3rd day of May, 1976

APPENDIX D

Notice Of Appeal

IN THE SUPREME COURT OF THE
STATE OF NEW YORK
ALBANY COUNTY

(Albany County Clerk's
Index No. 5803-76)

TUSCAN DAIRY FARMS, INC.

Appellant,

against

J. ROGER BARBER, As Commissioner of Agriculture and Markets of the State of New York,

Appellee.

NOTICE OF APPEAL TO THE SUPREME COURT OF THE UNITED STATES

(Filed October 6, 1978)

Notice is hereby given that Tuscan Dairy Farms, Inc., the appellant above named, hereby appeals to the Supreme Court of the United States from the final judgment of the Court of Appeals of the State of New York, entered in this action on July 11, 1978, affirming the order of the Appellate Division, Third Department which confirmed the determination of the Commissioner of Agriculture and Markets of the State of New York and dismissed the petition of the appellant herein.

This appeal is taken pursuant to 28 U.S.C. § 1257(2).

SHEA GOULD CLIMENKO & CASEY

By s/ MICHAEL LESCH
Michael Lesch, Esq.
A Member of the Firm
Counsel for Appellant
330 Madison Avenue
New York, New York 10017
(212) 661-3200

Notice Of Appeal

To:

County Clerk of Albany County
Courthouse
Albany, New York 12207

Thomas G. Conway, Esq.
Counsel to the Department of
Agriculture and Markets
Room 812—Building No. 8
State Campus
Albany, New York 12235

Notice Of Appeal

State of New York)
County of New York) ss.:

I, Dale C. Christensen, Jr., an attorney associated with the firm of Shea Gould Climenko & Casey, Attorneys of Record for Tuscan Dairy Farms, Inc., appellant herein, depose and say that on the 5th day of October, 1978, I served a copy of the foregoing Notice of Appeal to the Supreme Court of the United States on the Department of Agriculture and Markets of the State of New York, the appellee and the only other party herein, by placing a true copy thereof enclosed in a sealed envelope with first class postage thereon fully prepaid, in the official despository maintained and exclusively controlled by the United States Government at the corner of Madison Avenue and East 42nd Street, New York, New York, 10017, addressed as follows to the Counsel of Record of the Appellee:

Counsel to the Department of Agriculture
and Markets
Room 812—Building No. 8—State Campus
Albany, New York 12235

Attention: Thomas G Conway, Esq.
Counsel

Dale C. Christensen, Jr.

Dale C. Christensen, Jr.

[Sworn to on October 5, 1978.]

APPENDIX E

Memorandum of Department of Agriculture and Markets

DIS-1021 3/1/76

Milk Dealer Licensing Policy and Procedures

I. INTRODUCTION

Processors and distributors of fluid milk have had to adjust to very substantial changes in conditions affecting the marketing of their products during the 1960's and early 1970's. This has brought about many structural changes in the industry in New York State affecting competition, the viability of firms in each size category, the utilization of milk produced on New York farms and service to the public.

The licensing policy stated herein recognizes the dynamic nature of the milk business and is directed towards maintaining an efficient, service-oriented dairy industry in the State. The primary thrust of the policy is to stabilize competitive factors in the local markets while providing for orderly adjustment to changes in the technology and economics of milk marketing.

Major structural changes affecting milk marketing during the past 15 years include the dramatic shift of sales to chain supermarkets; specialization of many processors to serving chain store accounts with private label milk; decline of home delivery; obsolescense of small processing plants; vertical integration by some processors into captive dairy or convenience stores; a declining number of full-service dealers; and burgeoning costs of operating milk delivery routes. Advances in technology as against a declining demand for fluid milk have resulted in excess capacity in the industry. This has occurred despite very significant closings of plants and attrition in the number of licensed milk distributors. Even so, there are instances where smaller-volume wholesale and institutional customers are unable to obtain adequate milk delivery service.

Memorandum of Department of Agriculture and Markets

Excess processing capacity in the dairy industry, relatively high fixed costs of operations, and a declining market for fluid milk have combined to put the chain store organizations in a position to exploit their very substantial buying power. They have used such power at times to exact unreasonably low prices and favorable terms of sale from processors. The resulting cost savings to the chain stores have not generally been passed on to consumers.

Against this background, the task of developing a progressive yet orderly policy of license grants and extensions is difficult. The impact of a particular type of license application can be markedly different in each area, depending upon competition, structure and characteristics of the market.

II. PURPOSE

Licensing policy in conjunction with other economic controls over the dairy industry in the State is intended to:

1. Promote effective competition in each market.
2. Prevent undue concentration of sales.
3. Prohibit the use of coercive buying power by certain purchasers of milk.
4. Encourage viable middle-level processor-distributors and smaller-volume distributors in each market.
5. Maximize utilization and sales of milk in fluid form.
6. Maintain a choice of market outlets for producers.
7. Provide adequate service to smaller-volume milk customers at reasonable prices.
8. Insure competitive pricing and service to institutional outlets.

Memorandum of Department of Agriculture and Markets

III. POLICY

1. *Coverage:*

(a) Any person who proposes to purchase, handle or sell milk in a manner which represents the customary function of a milk dealer shall be required to file an application for license or extension of license. The applicant for such license or extension shall refrain from engaging in the business or functions for which the application is made until the application has been processed and authorization granted by the Department. An application will not be considered where the applicant has proceeded to operate without being duly licensed.

(b) Each application for a milk dealer's license or for an extension of a milk dealer's license to sell and distribute milk shall be for a specific county or counties, or a specific geographic area within a county and set forth in said application or extension, whether the applicant desires to sell and distribute milk on wholesale, retail or combination routes and each license issued or extended shall be limited to not more than the county or counties, or the specific geographic area within a county, designated in the application and shall be limited to the method of distribution set forth in said application.

(c) A food store, although exempt from licensing when acting in its capacity as a retailer of milk to consumers, shall be required to file application for a milk dealer's license whenever it proposes to process, transport or handle milk in the manner of a milk dealer or to sell milk to other than retail customers.

(d) A milk dealer may sell or distribute milk only to customers and accounts (including other milk dealers) within those markets or areas where he is duly licensed. He is precluded from arranging for f.o.b. or dock sales or

Memorandum of Department of Agriculture and Markets

other means of serving potential customers in other markets or areas regardless of the arrangements or methods which may be devised for the sale and delivery of the milk.

(e) Specific license authorization must be obtained by a milk dealer to deliver milk to his own stores or affiliated stores in markets or areas for which he does not currently hold a license to sell or distribute milk.

(f) Any proposed construction of a milk processing plant in an area for which a person or dealer is not licensed shall require the filing of an application for license or extension of license.

(g) Any purchase, merger or transfer of a significant percentage of stock of an existing milk dealer requires the filing of an extension application.

2. *Procedure:*

(a) Each application for a milk dealer's license or extension of license (including purchase of an existing milk business or stock transfer) shall be reviewed and analyzed by the Division of Dairy Industry Services in accordance with the provisions of Section 258-c and other pertinent sections of the Agriculture and Markets Law.

(b) A milk dealer's license or extension thereof may be issued after review by the Division of Dairy Industry Services in the following instances:

(1) Purchase of a business (including stock transfer) in a county where the purchaser possesses the same or greater license authorization than that of the company being purchased. The transfer of stock shall qualify under this section when the shares of stock have been bequeathed under the terms of the will of the decedent shareholder to a specific person or persons, or when the transaction is a sale or gift,

either outright or by trust from a shareholder to a member of his immediate family, or when the shares of stock are inherited under the laws of intestacy.

(2) Lease of a retail delivery route by a licensed milk dealer to an individual routeman.

(3) Construction or relocation of a dairy plant by a licensed plant operator in a county for which he is already licensed to operate a plant.

(c) Except for the instances set forth in paragraph (b) above wherein a milk dealer's license or extension thereto may be issued after review by the Division of Dairy Industry Services, each milk dealer licensed for a county or counties or a specific geographic area within a county shall be notified in writing, by certified mail, of any pending application for a milk dealer's license or extension relating to such county, counties or area. Such notice shall clearly set forth the nature and scope of the pending application, the date and location of any hearing scheduled thereon and invite the submittal of written information and comments relating to the pending application. A reasonable period of time shall be established for milk dealers who may be affected by such application to submit information and comments.

(d) Except for the instances set forth in paragraph (b) above, no application for a milk dealer's license or extension thereto will be granted until considered at a public hearing if any milk dealer licensed for the county, counties or an area therein submits in writing within the period established pursuant to paragraph (c) above a substantive reason or objection (i.e., it would lead to destructive competition in an area adequately served; it is against the public interest or the license or extension should not be granted by reason of the applicant's character, experience or financial responsibility) to issuance of such license or extension.

If after inviting written information and comments pursuant to paragraph (c), it is found that an application should be granted without hearing, each milk dealer licensed for the county, counties or area therein shall be notified in writing of such fact at least 10 business days in advance of the issuance of the license or extension.

(e) Each milk dealer licensed for the county or counties or a specific geographic area within a county shall be given reasonable notice and opportunity to appear and present testimony relating to such application at the public hearing wherein the said application for a milk dealer's license or extension thereto shall be heard.

Each milk dealer who paritcipates in a hearing to consider an application for license or extension shall be notified in writing at least 10 business days in advance of the issuance of such license or extension if the Commissioner determines, based upon the record of the hearing, that the application should be granted.

IV. HEARING PROCEDURE AND NOTICE

1. Copies of the Notice of Hearing will be mailed by certified mail to all dealers licensed in the area affected by the application. The Notice will be mailed at least 30 days before the hearing date, except where the application is for a single county or more limited area, the notice shall be mailed 20 days before the hearing date.

2. The hearing date will be established after consultation by the Department with the applicant. The Department will attempt to accommodate the convenience of the applicant but must reserve the right to fix the date as orderly administration may require. A scheduled hearing will not be adjourned except upon demonstration by the applicant of extraordinary and unavoidable necessity. All reasonable effort will be made to hold the hearing in the county, or

in the case of multpile counties in one of the counties for which the license or extension is requested.

3. Ordinarily, dealers will not be subpoenaed. Those who do not testify at the hearing will be presumed to have no objection to the application.

4. Dealers who wish to apply for the privilege of limited participation in the hearing, as a non-party, may do so by filing in writing their intention to participate with the Legal Bureau at least five days prior to the hearing. The person executing such notice of intention must be authorized to sign a statement that their participation at the hearing will not confer any greater rights upon them than they possess as an interested party to review the Commissioner's determination. Their rights will not be expanded by reason of their participation. However, said statement will not waive any rights the dealer may possess as such interested party to review the Commissioner's Final Determination in granting or denying the competing dealer's application. Such application will be treated as public information.

5. The privilege of limited participation in the hearing will be granted to dealers who file such an application. Such participation will be limited solely to the issues set forth in Section 258-c of the Agriculture and Markets Law of the State of New York, namely:

(a) That the applicant is not qualified by character or experience or financial responsibility. With respect to this issue, however, the participation shall be limited to the submission of written proof. Oral proof shall be submitted to the Department of Agriculture in advance of the hearing for its investigation.

(b) That the issuance of the license or extension of a license will tend to a destructive competition in a market already adequately served.

(c) That the issuance of the license or extension of a license is not in the public interest.

With respect to those issues, the representatives of a competing dealer may:

With respect to item 5(a) above:

i. Submit written proof thereof.

With respect to items 5(b) and 5(c) above:

i. Question department employees called to testify.
ii. Cross-examine witnesses called by the applicant.
iii. Introduce evidence and produce witnesses to testify.

6. If it is necessary for the Hearing Officer to fix a date or dates for continuation of a hearing, the date will be fixed by the Hearing Officer after consideration of the applicant's and the Department Attorney's schedule only.

V. TIME SCHEDULE

1. Upon receipt of an application for license or extension, it shall be reviewed for completeness and accuracy within 10 days of the date of receipt at the Department. If incomplete, it shall be returned promptly to the applicant with a letter of explanation.

2. Upon completion, the application shall be referred for investigation and analysis by the Division of Dairy Industry Services in accordance with the procedure described above. A decision, in accordance with procedure described above, as to whether the application is to be granted or referred for hearing will be prepared within 30 days of its completion. The applicant will be duly notified of such decision.

Memorandum of Department of Agriculture and Markets

3. If it is determined that an application should be referred for hearing, all relevant economic and competitive data shall be gathered and the matter submitted for hearing. The time required to prepare the economic analysis will depend upon the availability of data and the scope of the license application. Timing of the hearing after the economic analysis is prepared and receipt of objections by licensed dealers, if any, will be at the direction of the Legal Bureau.

4. After receipt of the hearing record and Hearing Officer's memorandum, a determination on an application shall be prepared and submitted to the Legal Bureau within 30 days. The Department will strive to issue a determination within 90 days of the close of a hearing. This will provide for 30 days to transcribe the record and preparation of a Hearing Officer's memorandum; 30 days for Division review and preparation of a determination; and 30 days for Legal review and final consideration by the Commissioner.